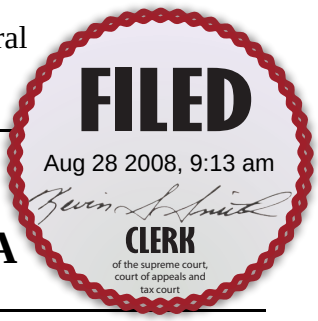
ATTORNEY FOR APPELLANT:

DOUGLAS R. LONG
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana



IN THE COURT OF APPEALS OF INDIANA

JEFFREY MILLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-0708-CR-466
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0604-MR-177

August 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jeffrey Miller appeals his convictions and eighty-five-year sentence for murder and robbery. Miller argues that the testimony of two witnesses testifying against him was incredibly dubious, that insufficient evidence exists to support his convictions, that the trial court erred in its instructions to the jury, and that his sentence is inappropriate. We affirm.

Facts and Procedural History

On April 12, 2006, Charlotte Robinette discovered her father, Charles Robinette, dead on the floor of his Anderson, Indiana apartment and called 911. Soon thereafter, the police and emergency medical personnel arrived at the apartment. While investigating, the police found a broken gallon jug on the floor next to Charles' head and glass from the jug on top of his head. The police also learned that Charles' F-150 truck, a computer tower, and a large quantity of cash from his apartment were missing. An autopsy indicated that Charles' skull was repeatedly struck with a blunt object, which caused it to fracture and ultimately caused his death.

During its investigation, the police learned from one of Charles' neighbors that Miller frequently hung around Charles' apartment. Thereafter, the police spoke with Anissa Tyler, a friend of Miller, who informed them that on April 12, 2006, Miller told her "that he had gotten into a fight and he had beat somebody up and he didn't know how badly he had beat them." Tr. p. 730-31. On previous occasions, Tyler and Miller played cards with Charles at his apartment and attempted to borrow money from him. Tyler

further informed the police that Miller often worked for Charles and frequently complained that Charles did not pay him appropriately for his efforts.

The police also spoke with Jana Brandle, an acquaintance of Tyler and Miller. According to Brandle, on the date of the incident she went with Miller to Charles' apartment and overheard Charles and Miller arguing about money. During the argument, Charles turned his back to Miller, and Miller struck him in the head with a coffee cup. Miller then grabbed Charles by his throat and slammed him against the refrigerator. Brandle ran out of Charles' apartment, fearful that the police would be called and she would be arrested.[1]

Thereafter, the police interviewed Miller, who denied striking Charles. Miller claimed that the last time he had seen Charles was on Saturday, April 8, 2006, when he and Charles attended church together. Miller originally told the police that Charles took him home after church. However, Miller later admitted that he did not go home but rather stayed up all night drinking with Charles around a fire in a vacant lot until Charles became intoxicated and passed out. While interviewing Miller, the police noticed bloodstains on his pants. A DNA test later revealed that the bloodstains contained a mixed DNA sample from two people whose DNA was consistent with that of Miller's and Charles' blood. The police also found the ignition key to Charles' truck in Miller's pants pocket.

[1] At the time, Brandle believed that the police had an outstanding warrant for her arrest regarding an unrelated car theft.

The State charged Miller with Count I, murder,[2] and Count II, robbery with a deadly weapon as a Class B felony.[3] A jury convicted Miller of both counts. At the conclusion of the sentencing hearing, the court identified as aggravators Miller's criminal history, which includes several misdemeanor and felony convictions, including burglary, theft, and possession of cocaine, and that he had recently violated probation. The trial court did not identify any mitigators. Thereafter, the court sentenced Miller to an enhanced term of sixty-five years for murder and twenty years for robbery, to be served consecutively for an aggregate sentence of eighty-five years. Miller now appeals.

Discussion and Decision

On appeal, Miller argues that the testimony of two individuals testifying against him was incredibly dubious, that insufficient evidence exists to support his convictions, that the trial court erred in its instructions to the jury, and that his sentence is inappropriate.

I. Incredible Dubiosity Rule

Miller contends that the testimony of Tyler and Brandle was incredibly dubious. The "incredible dubiosity rule" provides that a court may "impinge on the jury's responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002). The application of this rule is limited to where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial

[2] Ind. Code § 35-42-1-1.

[3] Ind. Code § 35-42-5-1.

evidence of the defendant's guilt. *James v. State*, 755 N.E.2d 226, 231 (Ind. Ct. App. 2001), *trans. denied*. "[A]pplication of this rule is rare and . . . the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no person could believe it." *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001) (citation omitted).

Miller argues that the

> testimony of State's witnesses [Tyler] and [Brandle] is incredibly dubious or inherently unreliable. . . . The specific inconsistent, improbable statements are [Brandle's] omission as to any reference to [Tyler]. She states that she was there with Miller, but makes no mention of [Tyler]. On the other hand, [Tyler] makes no mention of [Brandle]. She denies that she was at [Charles'] residence, but [Carl Duncan] testified that he received a call at 2:30 a.m., which phone records show came from [Tyler] from [Charles'] residence on the day [Charles] was killed. Brandle made no effort to contact the police and saw no connection between what she saw and [Charles'] death.

Appellant's Br. p. 15 (citations omitted). We find the incredible dubiosity rule is inapplicable here because there is not "a complete lack of circumstantial evidence of the defendant's guilt." *See James*, 755 N.E.2d at 231. Most notably, Miller's pants had bloodstains on them consistent with Miller's and Charles' blood. Additionally, there was more than a sole witness providing testimony against Miller. Miller's claim is merely a request for us to reweigh the evidence and assess Tyler's and Brandle's credibility, which we cannot do. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005).

II. Sufficiency of the Evidence

Miller also contends that the evidence is insufficient to support his convictions for murder and robbery with a deadly weapon. When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative

evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider only the evidence most favorable to the trial court's ruling. *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of innocence." *Id.* at 147 (quotation omitted). The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.*

To convict Miller of murder, the State had to prove that he knowingly or intentionally killed Charles. *See* Ind. Code § 35-42-1-1. In order to prove that Miller committed robbery as a Class B felony, the State was required to show that Miller knowingly or intentionally took property from Charles by putting him in fear or by using or threatening the use of force while armed with a deadly weapon. *See* Ind. Code § 35-42-5-1.

Miller does not dispute the cause of death. Rather, Miller denies being at Charles' apartment on the date of the incident and further denies fighting, hitting, or robbing him. In other words, Miller maintains that the evidence as a whole is insufficient to sustain his convictions. The evidence most favorable to the verdicts reveals that on the date of the incident Miller got into an argument with Charles concerning money. Thereafter, Miller struck Charles in the head and slammed him against a refrigerator. Charles' F-150 truck,

a computer tower, and a large quantity of cash from his apartment went missing. The ignition key to Charles' truck was found in Miller's pants pocket. Further, bloodstains located on Miller's pants were determined to be consistent with Charles' blood. To the extent that witnesses offered conflicting accounts of details, it was within the province of the jury to decide who to believe and which details were important. The evidence is sufficient to sustain Miller's convictions.

III. Jury Instructions

Miller next contends that final instructions four and eight were improper. Instructing the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. *Overstreet v. State*, 783 N.E.2d 1140, 1163-64 (Ind. 2003), *cert. denied*. "The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Id*. at 1163. When reviewing a challenge to a jury instruction, we consider whether: (1) the instruction is a correct statement of the law; (2) there was evidence in the record to support giving the instruction; and (3) the substance of the instruction was covered by other instructions given by the trial court. *Hubbard v. State*, 742 N.E.2d 919, 921 (Ind. 2001). The trial court ruling will not be reversed unless the instructions, taken as a whole, misstate the law or mislead the jury. *Snell v. State*, 866 N.E.2d 392, 396 (Ind. Ct. App. 2007). In order to be entitled to a reversal, the defendant must affirmatively show that the erroneous instruction prejudiced his substantial rights. *Id*.

Instruction four provides:

> Under the aiding, inducing or causing statute, participation in a crime may be inferred from a defendant's presence at the crime scene, failure to oppose the crime[,] companionship with one engaged therein, and a course of conduct before, during and after the offense which tends to show complicity.

Appellant's App. p. 78. At trial, Miller objected to the giving of instruction four as follows:

> First, I don't understand it. I've read it a couple of times, I don't even understand it. I'm not sure how instructive it is but second, the word, participation of a crime [may be] inferred, I don't doubt that's what the [*Harris*] case says, but stating that to the jury, I think that takes the burden off of the State. . . . indiscernible . . . prove beyond a reasonable doubt when you're instructing the jury to infer things. So I would first because the instruction is very confusing reading, second, because of the word inferred. I would object to instruction number four (4).

Tr. p. 874-75. In other words, Miller objects to the use of the word "inferred" claiming it impermissibly shifts the burden of proof. It does not. Rather, the use of the word "inferred," in this context, merely creates a permissive inference, which "suggests to the jury a possible conclusion to be drawn if the State proves predicated facts, but does not require the jury to draw that conclusion." *Brown v. State*, 691 N.E.2d 438, 444 (Ind. 1998) (quoting *Winegeart v. State*, 665 N.E.2d 893, 904 (Ind. 1996)). "Such an inference 'does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." *Id*.

Miller additionally maintains that instruction four is improper because it "unnecessarily emphasizes certain evidence and invites the jury 'to violate its obligation to consider all the evidence.'" Appellant's Br. p. 20 (quoting *Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003)). However, because Miller failed to object on this ground at trial he

has waived the issue on appeal. *See Helsley v. State*, 809 N.E.2d 292, 302 (Ind. 2004) ("A defendant must identify specific grounds in support of an objection to an incorrect jury instruction[.]"). Waiver notwithstanding, we agree that instruction four erroneously places undue emphasis on certain evidence. The Supreme Court has long held that "[i]nstructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved." *Ludy*, 784 N.E.2d at 461; *see also Ham v. State*, 826 N.E.2d 640, 642 (Ind. 2005) ("An instruction from the bench one way or the other misleads the jury by unnecessarily emphasizing one evidentiary fact."); *Ludy*, 784 N.E.2d at 459 ("To expressly direct a jury that it may find guilt based on the uncorroborated testimony of a single person is to invite it to violate its obligation to consider all the evidence."); *Dill v. State*, 741 N.E.2d 1230, 1232-33 (Ind. 2001) ("[A]lthough evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence.").

Instruction four is based on language from *Harris v. State*, 425 N.E.2d 154, 156 (Ind. 1981). In *Harris*, our Supreme Court stated:

> Although it is true that mere presence is not enough to show a person's participation in a crime, such presence may be considered with all other evidence to determine guilt. *A trier of fact may infer participation from a defendant's failure to oppose the crime, companionship with one engaged therein, and a course of conduct before, during, and after the offense which tends to show complicity.* While the State must sustain its burden of proof on each element of an offense charged, such elements may be established by circumstantial evidence and the logical inferences drawn therefrom.

Id. The Supreme Court used this language to address the sufficiency of the evidence on appeal rather than addressing an instruction to the jury at trial. Although the preferred

practice for instructing a jury is to use the pattern jury instructions, "there is no blanket prohibition against the use of appellate decision language" in jury instructions. *Gravens v. State*, 836 N.E.2d 490, 494 (Ind. Ct. App. 2005) (quoting *Hurt v. State*, 553 N.E.2d 1243, 1249 (Ind. Ct. App. 1990), *overruled on other grounds by Ham*, 826 N.E.2d 640). Nonetheless, the mere fact that certain language or expressions are used in the opinions of Indiana's appellate courts does not make it proper language for instructions to a jury. *Ludy*, 784 N.E.2d at 462.

Much like the highlighted instructions in *Ham*, *Ludy*, and *Dill*, instruction four erroneously places undue emphasis on certain evidence. Instruction four emphasizes the "defendant's presence at the crime scene, failure to oppose the crime[,] [and] companionship with one engaged therein." Appellant's App. p. 78. Highlighting such evidence is not recommended as it merely invites the jury "to violate its obligation to consider all the evidence." *See Ludy*, 784 N.E.2d at 459. Nevertheless, the giving of the instruction is harmless because of the overwhelming evidence against Miller in this case. Two witnesses testified that Miller got into a fight with Charles, Charles' DNA was found on Miller, and Miller possessed Charles' property. The instructional error did not affect the defendant's substantial rights.

Miller next argues that instruction eight is erroneous. Instruction eight states:

> Intent may be established by circumstantial evidence and inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points.

Id. at 82. At trial, Miller objected to instruction eight as follows:

> And I have no objection to the rest of them except for instruction number eight (8) and again, the same objection, using the word inferred, I believe

> takes away from the State[’s] burden to prove and have Mr. Miller guilty beyond a reasonable doubt.

Tr. p. 876. Miller’s objection to instruction eight is the same objection he has with instruction four: the use of the word “inferred” impermissibly shifts the burden of proof. It does not. For the same reasons explained above regarding instruction four, the use of the word “inferred,” in this context, also creates a permissible inference. *See Brown*, 691 N.E.2d at 444. We therefore find no error.

Miller additionally maintains that instruction eight is improper because it “unnecessarily emphasizes certain evidence and invites the jury ‘to violate its obligation to consider all the evidence.’” Appellant’s Br. p. 20. However, because Miller failed to object on this ground at trial he has waived the issue on appeal. Waiver notwithstanding, we conclude that instruction eight is more general than instruction four and therefore does not place undue emphasis on certain evidence. We find no error with instruction eight.

IV. Inappropriate Sentence

Miller also contends that his aggregate sentence of eighty-five years is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482,

491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Regarding the nature of the offenses, Miller violently hit Charles over the head with a glass jar resulting in his death and then robbed him of his F-150 truck, a computer tower, and a large quantity of cash. As for Miller's character, he has a significant criminal history comprised of several misdemeanor and felony convictions, including burglary, theft, and possession of cocaine. Miller committed the instant offenses while on probation and therefore violated his probation. Miller has failed to persuade us that his eighty-five-year sentence is inappropriate.

Affirmed.

MAY, J., and MATHIAS, J., concur.